

1671. *January 20.*CASSE *against* CUNYGHAME.

THE son of Mr. Casse, Doctor in Divinity, being minor, and for tutors having Mr. John Smith and others, had an infestment of annualrent to be uplifted out of the lands of Auchinharvie, which was judged expedient to be made over to any that would give a competent price for it; accordingly Mr. John Smith, as tutor, and as having a factory from all the rest, sells this right to doctor Cunyghame, who had taken course with all the other real rights that affected the said land. When Casse was major, he counts and reckons with Mr. John his tutor, who solely acted in his business, in regard of the factory he had from the rest, and approves of all he had done, and discharges him amply thereof. Notwithstanding whereof, within his years of twenty-five, he intents a summons of reduction of the disposition made by himself and his tutors to Sir Robert of that right, *ex capite minoritatis et læsionis*, and offers to refund the price received.

To this it was ANSWERED for Sir Robert,—That the pursuer can never be heard to quarrel that deed done in his minority, because he has ratified and homologated the same, in so far as he has counted and reckoned with Mr. John Smith, his tutor and factor, and has approven what he did, (now he did this amongst others,) and discharged him.

To this it was REPLIED,—That whatever discharge he has granted to his tutor, it can never debar him from quarrelling this defender; because, *Imo*, it is *res inter alios acta*, and so a discharge to Mr. John Smith can never import a discharge to Sir Robert Cunyghame; *2do*, Of the law the minor lesed, has two actions at his option;* one against his tutors for not doing his affairs profitably, and with the same diligence that a rational man uses in his own; another against the party with whom he contracted for rescinding the contract: now his discharging one of these two actions can never in reason cut him off from having recourse to the other, especially considering that the said discharge they obtrude, is clogged and burdened with qualities and protestations, that it may no way prejudice any other right or action he had competent to him in his person. To this it was answered, that though he had two several actions, yet they being both of one nature, and tending to the same, the passing from the one behoved to be an implicit passing from both; yet see *19th February, 1630, Hilderston contra Maxwell*, and the case there. And as for the protestations, the same being *contrariæ facto*, they cannot be respected. It was likewise urged, that every lesion was not enough to restore a minor, but it behoved to be such a one as at first sight incurred in any rational man's sense, *vide l. 4, D. de in integrum restitutionibus*. As for acts of homologation, see *Mr. David Thoires, his case against Sir A. Ramsay*, with the practiques of *Rires contra Rires, Young and Barnes*, and others cited therein.

Advocates' MS. No. 107, folio 86.

* That the minor has the election of any of thir two remedies, even the one after the other, is clear by Maximian's and Diocletian's laws, in *l. 3, and 5, ibique Cujacium in paratitlo, C. Si tutor vel curator intervenerit*: and the personal action against the tutors and curators lasts after the time allowed for seeking restitution; *ita Antoninus in l. 1, dicto titulo.*